United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-2028

TO BE ARGED BY:
Howard B. Comet

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

EDMUND GETTENS, :

Petitioner-Appellant :

- against - :

JOHN QUINN, Acting Chairman of the New York State Division of Parole, :

Respondent-Appellee :

- -x

B
P/s

DOCKET NO. 77-2028

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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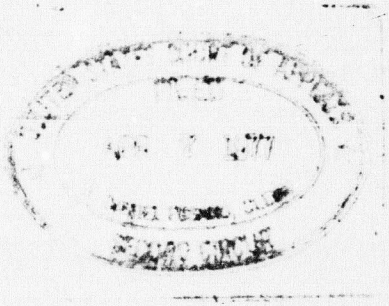

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EDMUND GETTENS, Petitioner-Appellant	:	
- against -	:	DOCKET NO. 77-2028
JOHN QUINN, Acting Chairman of the New York State Division of Parole, Respondent-Appellee	:	

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order denying a petition for a writ of habeas corpus, entered on February 9, 1977, by the Honorable George C. Pratt, Judge of the United States District Court for the Eastern District of New York. The order and opinion are unreported and are reproduced at pages one through eight of the Appendix.

In the District Court the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the petitioner-appellant in this Court.

OPINION AND ORDER BELOW

On February 9, 1977, the United States District Court for the Eastern District of New York (Pratt, J.) filed a memorandum of decision and order dismissing the petition for a writ of habeas corpus (see pp. 1 through 8 of appendix for complete decision). Petitioner had claimed that a confession, marijuana seized from his person and marijuana seized from an automobile in which he had been riding were all the tainted fruit of the unlawful impoundment and search of the automobile (A-3). Petitioner also argued that the District Court could hear this claim under Stone v. Powell, ____U.S.____, 96 S.Ct. 3037, 49 L. Ed. 2d 1067 (1976), because the petitioner was denied the opportunity to fully and fairly litigate his Fourth Amendment claim in the New York State Courts (A-3). The District Court disagreed with the latter argument and denied the petition without reaching the merits of the Fourth Amendment claim (A-3, A-7).

THE ISSUE PRESENTED

1. Did petitioner have an opportunity for full and fair litigation of his Fourth Amendment claim in the state courts where the merits of a key factual dispute were not resolved in the State court hearing; where through no inexcusable neglect of petitioner, the material facts were not adequately developed at the State court hearing; and where the factual determinations of the State court are not fairly supported by the record.

STATEMENT OF THE CASE

On January 10, 1975, judgment was rendered in the County Court of Nassau County (Samenga, J.), convicting the petitioner, by his guilty plea, of attempted criminal possession of a controlled substance in the sixth degree (N.Y. Penal Law §§110.00, 220.06), and sentencing petitioner to an indeterminate term of imprisonment of not less than one and one-half years nor more than three years.

In the State trial court, petitioner moved to suppress marijuana seized from his person and marijuana seized from the automobile in which he had been riding. He also moved to suppress an incriminating statement he had signed. These claims were rejected after a pre-trial hearing (A9-A111).

On direct appeal to the Appellate Division of the Supreme Court for the Second Judicial Department, petitioner contended that his Fourth Amendment rights were violated by the search of the car and his person and that his Fifth Amendment rights under Miranda v. Arizona, 384 U.S. 436 (1966), were violated when he was questioned without being warned that anything he said could be used against him. The Appellate Division affirmed without opinion on January 28, 1976, People v. Gettens, 51 A.D. 2d 686 (2d Dept. 1976), and leave to appeal to the New York State Court of Appeals was denied on March 4, 1976. People v. Gettens, 38 N.Y. 2d 942 (1976).

On July 27, 1976, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the

Eastern District of New York. By an order dated February 9, 1977, the petition was denied. (Pratt, J.) (A1-8). A certificate of probable cause was issued by the Eastern District Court on February 23, 1977, and a notice of appeal was timely served and filed.

STATEMENT OF FACTS

MINUTES OF SEARCH AND SEIZURE HEARING

On September 11, 1974, the petitioner appeared before the Hon. Alfred F. Samenga for a Search and Seizure Hearing.

WARREN HAACKE, a police officer with the Hempstead Police Department, testified that he first came into contact with the petitioner at approximately 1:20 a.m. on May 16, 1974, in the vicinity of Front Street and Main Street in Hempstead (A11, 12). Observing a 1967 Chevy with a very loud muffler, Haacke and his squad car partner, Walters, ordered the car to the side of the road and asked the driver, John Cruz, for his license and registration (A12, 13, 14). Cruz had a registration, but no license - only a valid learner's permit (A14, 29). Haacke then asked the other two occupant's of the car - the petitioner, seated in the front passenger seat, and Idalio Galerez, seated in the rear - if either of them had a valid New York State Operator's License (A15). When they replied they did not, Haacke asked all three occupants to leave the car and wait at its rear, and he prepared to check the vehicle in an inventory search and call a private towing firm to impound the car in accordance with Hempstead Police Department procedure (A15, 16, 17, 27, 33, 34). No one was under arrest at this point(A32, 34, 62, 63). As Cruz exited the vehicle on the driver's side, Haacke noticed an unsealed manila envelope on the floorboard of the car, on the edge

near the front seat (A17,18,35). He picked up the envelope and looked inside, observing a brown greenish substance which he thought was marijuana (A18). Haacke then placed Cruz, Valerez, and the petitioner under arrest, and he and Officer Walters gave them pat down searches (A19,20). In the process of patting down the petitioner's right rear pocket, Walters discovered a small manila envelope containing four hand-rolled cigarettes (A20,21). Haacke then made a further search of the car, and in a brown overnight bag next to the front passenger seat he found approximately 40 small manila envelopes, paper scales, a "hash pipe," and a large clear cellophane envelope containing what he thought was marijuana (A18). At this point Haacke and Walters drove the three occupants of the car to the Hempstead Police Station (A21). They had not yet been given their Miranda warnings or questioned (A36). A third police officer who had been called to the scene drove the Cruz vehicle to the station house, where it remained until it was released to Mr. Cruz or his representative (A47).

Once they arrived at the Police Station, Haacke watched as Walters advised the three arrested individuals that they had a right to remain silent, a right to a lawyer, that if they could not afford a lawyer one would be provided to them by the Court, and that if they wanted to waive their rights and be questioned they could stop in their questioning and ask to have a lawyer present (A22,23). After Walters made sure that everyone had understood what he had said (A23), Haacke

asked the petitioner where he had gotten the marijuana (A42). The petitioner did not reply (A42). The defendant remained under Haacke's supervision, but made no admissions to Haacke, or to Walters in Haacke's presence, prior to the arrival of Detective Howell of the Nassau County Police Department (A25, 44, 58). When Detective Howell arrived, he took a statement from the petitioner and gave him his Miranda warnings once again, also advising him that he had the right to waive his rights, and that he could make a statement, and that if at any time during the statement he wanted a lawyer present he could stop and request a lawyer (A41-42). Haacke took the suspected marijuana to the Scientific Investigation Bureau to be analyzed (A26). Cruz, the driver of the car, was issued a summons for having an improper muffler and being an unlicensed operator (A29,30).

Haacke noted on his memo pad for the night of the arrest that the petitioner had been arrested at 1:20 A.M. (A50,51). He made no entries regarding the other two occupants of the car, nor did he note anything about any impoundment of the vehicle(A51). Haacke also testified that he had given sworn testimony to the grand jury regarding the initial police contact with the petitioner, the arrest, and the petitioner's subsequent statement (A56,57,58). He had filled out a Form 32 case report which stated that

> "...the defendants were stopped for VTL violation 37531. Upon investigation the driver, Juan Cruz, failed to produce an operator's license. The driver and occupants (2) were asked to step out of the motor vehicle. The complainant then

> noticed a small brown envelope on the driver's floorboard. Complainant opened it and found a green grass like substance (marijuana) in envelope." (A60).

He had signed a Fo 85-A, which had been typed by Detective Howell pursuant to information supplied by Haacke, which reported that Haacke had observed a 1967 Chevrolet northbound on Main Street

> "with loud mufflers. The arresting officer stopped the vehicle at the intersection of Jackson for violation of VTL 375.31. At this time the operator of the vehicle, Juan Cruz, could not produce a license. He was asked to exit the vehicle by the arresting officer. Upon exiting the vehicle the arresting officer observed a brown paper envelope containing a brownish green substance lying on the operator's side of the vehicle on the floor. The arresting officer conducted a lawful search of the vehicle incidental to the arrest and found a quantity of a brownish green substance..." (A61, 62).

Haacke reported that he had referred to the minutes of his grand jury testimony, the Form 32 case report, and the Form 85-A prior to coming to court for the search and seizure hearing (A53).

Haacke also testified at the hearing that, although he did not have a copy of the Rules and Regulations of the Hempstead Police Department with him, he believed that they contained a section regarding the impounding of vehicles (A48). Judge Samenga sustained objections to cross-examination by petitioner's attorney as to whether Haacke claimed to have followed the Police Department Rules and Regulations in connection with impounding the vehicle (A49).

PETER WALTERS, a police officer with the Hempstead Police Department, testified that he had been on a tour of duty with

Officer Haacke at approximately 1:20 a.m. on May 16, 1974 and that he and Officer Haacke had stopped the vehicle that the petitioner was in (A68). Both officers had approached the car on the driver's side (A74). Haacke asked the driver and passengers if anyone had a license (A68). The petitioner initially responded that he had a license; Walters asked him for his name and date of birth so he could check it with New York State, and then the petitioner said that he didn't have a license (A69). The occupants were then ordered out of the vehicle, and Walters had begun walking back towards the police car when he heard Haacke say he had found a brown package with what appeared to be marijuana in it (A69,70). Cruz, the driver of the car, disclaimed any knowledge about where the marijuana had come from (A81). Walters then asked the petitioner to place his hands on the car, went through his back pockets and found an envelope containing four marijuana cigarettes (A70). Walters asked the petitioner about the cigarettes, and the petitioner began to cry and said, "Oh, let me go, It's only four cigarettes." (A83). Officer Haacke then showed the petitioner the plastic night bag and asked him if it was his (A83,84). Walters did not remember the petitioner's response to Haacke's question (A84).

The petitioner and the other two suspects were then taken to the Hempstead Police Station, where Walters gave them their Miranda warnings and asked them each individually whether they understood their rights (A70). Then, after initially questioning Cruz, Walters asked the petitioner if

the large bag of marijuana was his (A71, 72). The petitioner admitted it was his, but refused to tell the officer where he had gotten it (A71).

ROBERT HOWELL, a detective with the Third Squad, Nassau County Police Department, testified that he first came into contact with the petitioner on May 16, 1974, at approximately 2:00 a.m., when he arrived at the Hempstead Police Department in response to a call for assistance with an investigation (A85,86). After being given a rundown on the case by Officer Haacke, Howell gave the petitioner his Miranda warnings and asked him if he wanted an attorney present (A86,87, 92). The petitioner indicated that he did not want an attorney present, and was willing to make a statement (A87). Howell told the petitioner that he and his friends were going to be arrested for the marijuana, whereupon the petitioner said that his two friends had had no knowledge of the marijuana (A87). Howell then asked the petitioner if he would give a written statement to that effect, and the petitioner replied that he would (A87). After questioning the petitioner further, Howell wrote a three-page statement which the petitioner read and signed (A87, 88, 91).

At the conclusion of the hearing, after brief argument, the Court denied the petitioner's motions to suppress the physical evidence and the written statement. (A107-110).

ARGUMENT

PETITIONER WAS DENIED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIM OF AN ILLEGAL SEARCH AND SEIZURE

Petitioner's application for a writ of habeas corpus was denied by the District Court on the ground that he had been granted a full and fair opportunity to litigate his Fourth Amendment claim in the New York State courts within the meaning of Stone v. Powell, 428 U.S. ____, 96 S.Ct. 3037, 49 L.Ed 2d 1067 (1976). The holding that petitioner had such an opportunity was incorrect because the merits of a key factual dispute were not resolved in the State court hearing; through no inexcusable neglect of the petitioner, the material facts were not adequately developed at the State court hearing; and the factual determinations of the State court are not fairly supported by the record.

To the extent they were developed at the State court hearing, the facts underlying petitioner's Fourth Amendment claim may be briefly stated. The car the petitioner was riding in was stopped at approximately 1:20 a.m. on May 16, 1974, in the vicinity of Front Street and Main Street in Hempstead, New York. The car had been ordered to a stop in a no-parking zone by Officers Warren Haacke and Peter Walters of the Hempstead Police Department because it had a very loud muffler. When asked to produce license and registration, the driver of the car, John Cruz, produced a valid registration, but he had no driver's license - only a valid learner's permit. Officer Haacke then asked the

other two occupants of the car - the petitioner, seated in the front passenger seat, and Idalio Galerez, seated in the rear - if either of them had a valid New York State driver's license. When they replied they did not, Haacke asked all three occupants to get out of the car.

Officer Haacke testified that at this point he began to check the vehicle as part of an inventory search that he was conducting prior to telephoning a private towing firm to impound the car. This impoundment theory was, as discussed below, the only possible justification for the search of the car since Haacke testified that none of the occupants of the car was under arrest at this point. In searching, Haacke first noticed an unsealed manila envelope on the floor of the car. He picked up the envelope and looking inside, he observed a brown-greenish substance which he believed to be marijuana.

Cruz, Valerez and the petitioner were then placed under arrest and four marijuana cigarettes were found in the petitioner's coat pocket. A further search of the car turned up a brown overnight bag containing some small manila envelopes, paper scales, a "hash pipe", and a cellophane envelope with more marijuana. Haacke and Walters then drove the three occupants of the car to the Hempstead police station, while a third police officer who had been called to the scene drove the Cruz vehicle to the station.

At the police station the petitioner signed a written statement indicating that he was solely responsible for the

marijuana in the car and that his two friends had no knowledge of the marijuana. As a result, the petitioner was charged with criminal possession of a controlled substance and his friends were released from custody. Cruz, the driver of the car, was issued a summons for having an improper muffler and driving without a license.

There are a number of points to be made about this evidence that support petitioner's contention that he was denied the opportunity to fully and fairly litigate his Fourth Amendment claim. First, the key factual dispute that was not resolved by the State trial court was whether the alleged impoundment and inventory search of the Cruz vehicle was conducted in accordance with the standard procedures or official regulations of the Hempstead Police Department. Indeed, this issue was of controlling importance in determining whether the alleged impoundment and inventory were reasonable. E.g., South Dakota v. Opperman, ____U.S.____, 96, S.Ct. 3092, 49 L. Ed. 2d 1000 (1976). Moreover, the facts relevant to this issue were not adequately developed because of rulings by the trial court. And, as discussed below, other material facts were not adequately developed because of rulings by the trial court. Finally, the finding of the State trial court that an impoundment and inventory search took place - made without any analysis of conflicting evidence - is not fairly supported by the record. The preliminary question, however, is whether these defects in the State court hearing bring this case within the exception to Stone v. Powell, supra.

The Meaning of Stone v. Powell.

In Stone v. Powell, 428 U.S. ____, 96 S.Ct. 3037, 49 L. Ed. 2d 1067 (1976), the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim,[36] a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[1] 49 L. Ed 2d, at 1088. The meaning of the phrase, "an opportunity for full and fair litigation," is left totally unexplained by the Stone opinion except for the text of footnote 36: "Cf. Townsend v. Sain, 372 U.S. 293 (1963)."

It is not surprising, given this limited clue, that the lower courts have experienced difficulty in defining when a Fourth Amendment claim may be litigated in a federal habeas corpus proceeding. The leading cases on this issue thus far are the decision of this Court in Gates v. Henderson, No. 76-2065, Slip Opinions at 1345 (2d Cir. Jan. 12, 1976),[2] and the decision of the Fifth Circuit in O'Berry v. Wainwright, 546 F. 2d 1204 (5th Cir. 1977). Even though these two decisions involve somewhat different interpretations of

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[1]The petitioner herein was convicted after a guilty plea rather than a trial. However, because New York allows appeals from the denial of a motion to suppress evidence even after a guilty plea, N.Y. Criminal Procedure Law §710.70(2), the guilty plea in this case is not a bar to federal habeas corpus jurisdiction. Lefkowitz v. Newsome, 420 U.S. 283 (1975).

[2]A petition for rehearing en banc has been granted in Gates v. Henderson. Thus, the decision of this Court in the instant case may well turn on the decision of the full court in Gates.

Stone v. Powell, it is clear that under either decision the ruling of the District Court in the instant case was incorrect and must be reversed.

In Gates v. Henderson, the Court noted the difficulty in interpreting the holding in Stone that a Fourth Amendment claim may be litigated in a federal habeas corpus proceeding where the State courts have not provided the opportunity for full and fair litigation of the claim. Slip Opinion, at 1352-53. The Court then went on to note the aforementioned reference in Stone to Townsend v. Sain, 372 U.S. 293 (1963), and substantial weight was accorded to this reference in interpreting Stone. Gates v. Henderson, Slip Opinion, at 1353-55. Cf., Pulver v. Cunningham, 419 F. Supp.1221, 1223-24 (S.D.N.Y. 1976).

In Townsend v. Sain, 372 U.S. 293 (1963), the Court considered the problem of when it is appropriate for a federal district court to hold an evidentiary hearing on a claim for habeas corpus relief brought by a state prisoner. It was held that,

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts.

Id., at 312-13. The use of the "full and fair" language in both Townsend and Stone v. Powell, supra, as well as the citation to Townsend in the Stone opinion, suggests that the criteria in Townsend for determining when "the habeas applicant

did not receive a full and fair evidentiary hearing in a state court" are to be accorded great weight in applying Stone v. Powell. And that is essentially how this Court defined the relationship between Townsend and Stone in Gates v. Henderson, supra.

Thus, in Gates the Court looked to the six Townsend criteria for when a federal evidentiary hearing must be held:

> The six situations are:
> 1. Where the state court has not made adequate factual or legal findings to support its conclusion. 372 U.S. at 313-16;
> 2. Where the state factual determinations are "not fairly supported by the record," id. at 316;
> 3. Where "serious procedural errors" have been employed in the factfinding process, id.;
> 4. Where newly discovered evidence bearing upon the constitutionality of the detention is alleged in a habeas petition, id. at 317;
> 5. Where "evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing," unless there was "inexcusable" default under Fay v. Noia, 372 U.S. 391, 438 (1963), 372 U.S. at 317; and
> 6. Where - open endedly - "the state court has not after a full hearing reliably found the relevant facts," id. at 318.

Gates v. Henderson, Slip Opinion, at 1354 n.5.

The Gates Court proceeded to apply the first and fifth Towsend categories in holding that the petitioner in that case had been denied the opportunity for full and fair litigation of his Fourth Amendment claim. Likewise, in the instant case, the first, second and fifth Townsend categories are relevant. Substantially equivalent categories for determining when the State hearing has been less than full and fair have been codified in 28 U.S.C. §2254(d). Indeed, 28 U.S.C. §2254 (d) "is treated in this Circuit as, in essence, a codification

of the hearing criteria of Townsend v. Sain." United States ex rel. Lewis v. Henderson, 520 F. 2d 896, 902 n. 5 (2d Cir. 1975).[3] With respect to the instant case, the categories in 28 U.S.C. §2254(d) relevant to the instant case are: 1) "that the merits of the factual dispute were not resolved in the State court hearing," 28 U.S.C. §2254(d)(1); 2) "that the material facts were not adequately developed at the State court hearing," id., at §2254(d)(3); and 3) the "factual determination is not fairly supported by the record," id., at §2254(d)(8). Thus, applying Gates to the instant case, use of either the Townsend criteria or the 28 U.S.C. §2254(d) criteria would lead to the conclusion that this case comes within the exception in Stone v. Powell, supra.

However, some courts have held that the exception in Stone should not be read as being entirely based on the Townsend criteria for holding an evidentiary hearing. O'Berry v. Wainwright, supra 546 F. 2d, at 1211; Pulver v. Cunningham, supra 419 F.Supp., at 1224. But, the limitations placed on the use of the Townsend criteria by these cases are not

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[3]Insofar as the procedure in a federal habeas corpus proceeding is concerned, the relationship between Townsend v. Sain, supra, and 28 U.S.C. §2254(d) is explained in Note, Developments in the Law - Federal Habeas Corpus, 83 Harv.L. Rev. 1038, 1122 n. 46 (1970):

> On its face and in light of the legislative history, the [statute] is not directed at the question whether to hold a federal evidentiary hearing. Instead, it assumes that a hearing is to be held and attempts to decide if the state's factual conclusions are to be deemed presumptively correct at that hearing. Though their purposes are distinguishable, the [statute] and Townsend do reinforce each other. If the procedure at the state hearing was so inadequate that a Townsend hearing is necessary, it would be inconsistent, as the statute recognizes, for the judge at the federal evidentiary hearing to treat the state decision as presumptively correct.

relevant to the instant case.

First, in Pulver the Court held that the petitioner had not been denied the opportunity for full and fair litigation of his Fourth Amendment claim even though the material facts had not been adequately developed at the State court hearing. This was because the full facts were subsequently developed at trial and were before the appellate court. Thus, since Stone v. Powell includes appellate review as part of the opportunity for full and fair litigation, it was held that such an opportunity had been granted in Pulver. 419 F. Supp., at 1224. In the instant case, there was no trial and the material facts have still not been adequately developed. Appellate review could not correct this problem because the appellate court was limited to the trial court record. E.g., People v. Mann, 42 A.D. 2d 587, 588 (2d Dept. 1973).

Second, this same problem of appellate review was discussed as a limitation on the usefulness of the Townsend criteria in O'Berry v. Wainwright, supra 546 F. 2d, at 1212-13. A more relevant problem discussed in O'Berry is the issue of what is meant by the term "opportunity" in Stone v. Powell's reference to "an opportunity for full and fair litigation." The use of this term suggests that under some circumstances, defects in the State court hearing may be the result of a procedural default by the petitioner that will bar re-litigation of the Fourth Amendment claim in a federal habeas corpus proceeding. O'Berry holds that the test for determining when such a procedural default has occurred is the test in

Henry v. Mississippi, 379 U.S. 443 (1965), for when a State rule of procedural default will constitute "an independent, adequate, non-federal stateground" barring federal review. O'Berry v. Wainwright, supra 546 F. 2d, at 1216-17. This is the main difference between O'Berry and Gates v. Henderson, supra, since Gates holds that the test for procedural default under Stone v. Powell is the "deliberate bypass" test articulated in Fay v. Noia, 372 U.S. 391 (1963). Gates v. Henderson, Slip Opinion, at 1357-60.[4] However, as discussed below, under either test for procedural default, none of the defects in the State court hearing in the instant case can be attributed to the petitioner.

Finally, the O'Berry decision is directly relevant to the instant case in its holding that, 'Where factual issues are in dispute, Townsend would provide a relatively clear formula for determining whether full and fair consideration of a fact issue has been afforded by the state courts." O'Berry v. Wainwright, supra 546 F. 2d, at 1211. Moreover, the O'Berry Court fully adopted the Townsend view that, "There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues tendered by the defendant." 546 F. 2d, at 1212 n. 12.

[4]The Gates Court also rejected the argument that the decisions in Francis v. Henderson, ___U.S.___, 96 S.Ct. 1708, 48 L.Ed 2d 149 (1976), and Estelle v. Williams, ___U.S.___, 96 S.Ct. 1691, 48 L.Ed 2d 126 (1976), had modified the general application of the deliberate bypass test to federal habeas proceedings. Gates, Slip Opinion, at 1358-59.

In sum, the three cases discussed - Gates v. Henderson, supra, Pulver v. Cunningham, supra, and O'Berry v. Wainwright, supra - hold that where there is a claim that the petitioner has been denied an opportunity for full and fair litigation within the meaning of Stone v. Powell, supra because of an inadequate development or resolution of factual issues, then this claim is to be tested by the criteria in Townsend v. Sain, supra, which are codified in 28 U.S.C. §2254(d). Some limitations on this test may arise where there has been a procedural default by the petitioner or where appellate review serves to correct inadequacies in the trial court proceedings. Otherwise, the Townsend criteria and the statutory criteria may be directly applied.[5] With these principles in mind, it may be seen that the petitioner in the instant case was denied the opportunity for full and fair litigation of his Fourth Amendment claim.

Lack of Resolution of the Merits

The most significant defect in the State court hearing in the instant case was the failure of the trial court to resolve whether the alleged impoundment and inventory search of the car that the petitioner was riding in was conducted in accordance with standard procedures or official regulations of the Hempstead Police Department. The significance of this failure is revealed by an examination of the basic principles of law governing the merits of petitioner's Fourth Amendment claim. Thus, although the Supreme Court has validated warrantless searches of automobiles in circumstances that

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[5]It may be noted that the District Court's opinion in the instant case makes no reference to Townsend v. Sain, supra.

would not justify a search of a building, Cady v. Dombrowski, 413 U.S. 433 (1973); Chambers v. Maroney, 399 U.S. 42 (1970), these cases do not establish a blanket "automobile exception" to the Fourth Amendment's warrant requirement. See, Preston v. United States, 376 U.S. 364 (1964); South Dakota v. Opperman, ____U.S.____, 96 S.Ct. 3092, 49 L.Ed. 2d 1000, 1013 (1976)(Powell, J., concurring). "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away. . ." Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971). And a "search, even of an automobile, is a substantial invasion of privacy." United States v. Ortiz, 422 U.S. 891, 896 (1975). Accordingly, searches and seizures of automobiles must, at least, meet the Fourth Amendment test of reasonableness. Preston v. United States, supra.

In this case the warrantless search of the Cruz vehicle was justified as an alleged inventory search pursuant to an impoundment. Whether this was a legal basis for the search under the circumstances of the instant case is questionable. However, it is clear that, under the principles of law discussed above, there is no other legal theory that even arguably would have justified the initial intrusion into the small manila envelope on the floor of the Cruz vehicle - the intrusion that led to the arrest of the petitioner, the further search of his person and the car, and the incriminating statements made by the petitioner.

A manila envelope, in and of itself, is obviously not an incriminating object that will provide reasonable cause for a warrantless search or invoke the "plain view" exception

to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443 (1971); People v. Corrado, 22 N.Y. 2d 308 (1968) (directly on point). Since the three occupants of the Cruz vehicle were not under arrest prior to the search of the envelope, its seizure and examination cannot be justified as a search incident to a lawful arrest. Cf., Chambers v. Maroney, 399 U.S. 42 (1970).

Furthermore, on the basis of the state court record, there was no reason to suspect any violations by Cruz other than those for which summonses were ultimately issued. Cetainly a motorist stopped because of an ordinary traffic violation has not demonstrated a propensity for violence or crime. In this case, the driver of the car pulled over to the side of the road as soon as he was directed to by the police officers. He produced the vehicle's registration and a valid learner's permit for the officers' inspection. Officer Haacke testified that there was no question in his mind as to the identity of the driver - so there was no reason to suspect the car was stolen. There were no suspicious smells and no furtive movements by any of the occupants of the car. In short, as the record stands, there was nothing to indicate anything other than an ordinary traffic violation, and certainly no probable cause justifying a warrantless search. Cf., Cardwell v. Lewis, 417 U.S. 583 (1974).

It is thus apparent that the question of whether the Cruz vehicle was lawfully impounded is of critical significance to this case since there is no other basis that can even argu-

ably justify the search. And whether or not the alleged impoundment was lawful depends on whether it was conducted in accordance with standard procedures or official regulations of the Hempstead Police Department. This view is most clearly articulated in the recent Supreme Court decision in South Dakota v. Opperman , ____U.S.____, 96 S.Ct. 3092, 49 L. Ed 2d 1000 (1976).

In Opperman, the police had impounded the car that was unattended and parked for an extended time in a no-parking zone. An inventory search of the car was conducted and marijuana was found in the glove compartment. No issue was raised about the propriety of either the impoundment or the removal of property that was in plain view in the car, but the search of the unlocked glove compartment was contested and the Court upheld the search by a 5-4 vote. In so holding, both the Court's opinion and the concurring opinion of Mr. Justice Powell strongly emphasize the importance of the fact that the impoundment and inventory in Opperman were conducted pursuant to the official, written regulations of the local police department and that such procedures are "routine" and "standard" and in line with the "routine" procedures of most local police departments. 49 L. Ed. 2d, at 1005-09; id., at 1010-14 (Powell, J., concurring).

The reason why impoundment of vehicles and inventory searches are legal only when conducted in accordance with standard procedures has to do with the fact that the Fourth Amendment warrant requirement is inapplicable to such actions.

The warrant requirement is inapplicable because it is linked to the probable-cause standard and that standard "is peculiarly related to criminal investigations, not routine, noncriminal procedures." Id., at 1006 n. 5. Yet, an impoundment and inventory search is still a seizure and search for Fourth Amendment purposes. Id., at 1006 n. 6; id., at 1010 n. 1 (Powell, J., concurring); id., at 1015 n. 2 (Marshall, J., dissenting). Thus, the seizure and "unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many instances." Id., at 1011 (Powell, J., concurring). Mr. Justice Powell stated that such a search was not at issue in Opperman because,

> As the Court's opinion emphasizes, the search here was limited to an inventory of the unoccupied automobile and was conducted strictly in accord with the regulations of the Vermillion Police Department. Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles.

Id., at 1011-12. And Mr. Justice Powell further emphasized that the discretionary determination involved in the probable cause standard is not relevant because,

> The officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized.

Id., at 1013-14.

In sum, since the warrant requirement is inapplicable, standard procedures are required to govern the time, place, manner and scope of impoundments and inventory searches, thus ensuring that such actions occur only when reasonable.

And while Opperman was decided after the hearing in this case, the District Court was incorrect in stating that the petitioner's reliance on Opperman was based on "the benefit of hindsight" (A-5). As the Opperman Court noted, 49 L. Ed 2d, at 1005-07, Opperman was largely a reaffirmation of earlier decisions. Cady v. Dombrowski, 413 U.S. 433, 444-48 (1973)(relying on fact that search of car was "standard" police procedure); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221-22 (1968) (search held illegal, noting that impoundment was not authorized by state law); Cooper v. California, 386 U.S. 58, 60-62 (1967) (upholding search, relying on fact that seizure was authorized by state law).

Despite this case law, the State trial court - in its findings of fact and conclusions of law at the end of the suppression hearing (A107-110) - made no determination as to whether or not the alleged impoundment and inventory search was conducted in accordance with standard procedures or official regulations of the Hempstead Police Department. Thus, the merits of the factual dispute were not resolved in the State court hearing. 28 U.S.C. §2254(d)(1). And, under Townsend v. Sain, supra, the State court has not made adequate factual findings to support its conclusion.[6] 372 U.S., at 313-16. Accord, United States ex rel. Lewis v. Henderson, 520 F. 2d 896, 902-03 (2d Cir. 1975).

This defect in the State court hearing cannot be attributed to a procedural default by the petitioner. As more fully

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[6]This defect was not corrected by appellate review because the Appellate Division affirmed without opinion. People v. Gettens, 51 A.D. 2d 686 (2d Dept. 1976).

discussed below, the State trial court prevented petitioner's counsel from questioning Police Officer Haacke about whether he claimed to have followed the Rules and Regulations of the Hempstead Police Department. And, as the District Court noted, "petitioner's trial counsel argued in his summation that proper procedures were not followed." (A-6). Thus, petitioner raised the issue of standard procedures and "[t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." Townsend v. Sain, supra 372 U.S., at 313-14.

Material Facts Inadequately Developed

The State court hearing was also insufficient to allow for adequate development of the material facts since the trial court prevented petitioner's counsel from cross-examining Police Officer Haacke about a number of key issues. First, Officer Haacke testified that although he did not have a copy of the Rules and Regulations of the Hempstead Police Department with him in court, he thought they contained a section regarding motor vehicle impoundment. The following exchange then occurred:

> [DEFENSE COUNSEL]: And is it your contention, Officer, that you followed the rules and regulations of the Hempstead Police Department in connection with the impounding of that vehicle?
>
> [PROSECUTOR]: Objection, Your Honor. That would be irrelevant.
>
> THE COURT: Sustained.
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> [DEFENSE COUNSEL]: Your Honor, I submit that this is very relevant. He's trying to hang this search on an inventory search on an impoundment when in fact no impoundment took place.

[PROSECUTOR]: Objection to defense counsel's characterization of the witness' testimony.

THE COURT: Sustained.

(A48-49).

The District Court held, in effect, that these rulings by the State trial court did not prevent development of the facts about the regulations because, "The patrolman's belief as to whether he followed the regulations was irrelevant, and the second objection was directed at the characterization of the testimony and not at the line of questioning itself." (A-5). But, contrary to the statement of the District Court, the first question was not about the police officer's "belief," but about his "contention," i.e., his authority for the action he took. This was a proper question both to test the officer's credibility and to learn the contents of the rules and regulations. In a suppression hearing in New York, the prosecution has the burden of going-forward to show the legality of police conduct. People v. Berrios, 28 N.Y. 2d 361 367 (1971). And it is the police officer who must articulate the grounds for his action. Terry v. Ohio, 392 U.S. 1, 27 (1968); Sibron v. New York, 392 U.S. 40, 64 (1968).

Moreover, the State hearing court sustained an objection to the question about the rules not on the basis of the form of the question, but on relevance grounds. And when the defense counsel attempted to explain the relevance of the question, the court sustained an objection to the argument. These rulings prevented adequate development of the facts about the regulations. And further support for the view that the State trial court was holding that evidence about the

regulations was irrelevant may be found in the New York holding that "the existence or nonexistence of a police regulation cannot be used as a predicate for determining the issue of the reasonableness of an 'inventory search' of a vehicle." People v. Robinson, 36 A.D. 2d 375, 377 (2d Dept. 1971). This holding makes it clear that the material facts were not adequately developed in the instant case because New York law is in conflict with federal law. This Court has held that where the scope of inquiry is restricted because of a difference between state and federal law, then Stone v. Powell, supra allows for federal litigation. Kahn v. Flood, No. 76-2138, Slip Opinions at 1919 (2d Cir. Feb.22, 1977). Accord, United States ex rel. Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976).

The District Court also held that "even if the cross-examination were improperly curtailed, petitioner was in no way precluded from calling his own witnesses or, for that matter, introducing into evidence the regulations themselves." (A-6). This is illogical since if cross-examination about the regulations were curtailed because evidence about the regulations was deemed irrelevant, then the petitioner would have been precluded on relevance grounds from introducing evidence about the regulations. Moreover, it was learned after the State court hearing that the Hempstead Police Department had no official written regulations concerning impoundments and inventory searches at the time of petitioner's arrest. At the time of the hearing, there were regulations

(A-112), but these regulations would not govern the validity of the police action in this case. Thus, it would have been impossible for petitioner to introduce evidence about non-existent regulations.

Moreover, the inadequate development of t' rial facts abou the regulations cannot be attribut he petitioner. Petitioner did not deliberately bypass this issue, nor was there any procedural default under New York law. Cf., Gates v. Henderson, supra; O'Berry v. Wainwright, supra.

The District Court also held that, "Petitioner's trial counsel was in no way precluded from testing Officer Haacke's credibility generally; nor was he precluded from pursuing a line of questioning dealing with when and why the officer decided to impound the vehicle." A-5). This holding is inaccurate because cross-examination was curtailed in several areas.

First, Officer Haacke testified that after the marijuana was found, the Cruz vehicle was not impounded. Instead, it was driven to the police station by a police officer. However, the State trial court prevented petitioner's counsel from asking when and to whom the car was released. And the State trial court granted the prosecutor's motion on relevancy grounds to strike the testimony that the car was driven to the police station (A-47). These matters were relevant in testing the credibility of the officer's testimony that an

impoundment had occurred. They were also relevant to the alleged justification for the impoundment since it was claimed that the car had to be impounded to prevent an unlicensed person - John Cruz - from driving the car. This justification would appear to be a pretext if the car was released to Cruz on the same night when he was exonerated on the unrelated charge of marijuana possession.

The State trial court also prevented petitioner's counsel from questioning Officer Haacke about his failure to make any reference at all to an impoundment in his testimony before the grand jury, in his Form 32 case report, or in his Form 85-A crime report (A-59, 60, 64). Again, this was highly relevant to testing Officer Haacke's credibility.

Finally, the State trial court prevented petitioner's counsel from questioning Officer Haacke about alternatives other than impoundment that were available to Officer Haacke when he learned that there was no licensed driver in the Cruz vehicle (A-27). Such questioning was directly relevant to why Haacke decided to impound the car. And this questioning was particularly important in the instant case because there appears to be no justification for the impoundment. The Village of Hempstead has chosen not to exercise the authority granted by state law [New York Vehicle and Traffic Law §1640(14)], to provide for impoundment of illegally parked cars.[7] Code of Ordinances of Village of Hempstead §10-4.

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[7]It may be noted that the State trial court made no finding that the Cruz vehicle was illegally parked.

And §1204(a) of the New York Vehicle and Traffic Law would only allow the illegally parked car to be moved to a legal space.[8] The case relied on by the State trial court - People v. Sullivan, 29 N.Y. 2d 69 (1971) - is inapposite because Sullivan is concerned with the validity of an inventory search once the car is lawfully impounded, and not with the distinct question of when the impoundment may occur. And in numerous cases, courts have held that where there is no licensed driver and/or the car is illegally parked, there is no justification for an impoundment when alternatives exist. State v. Boster, 217 Kan. 618, 539 P. 2d 294 (1975)(illegally parked); State v. Bales, 115 Wash. App. 834, 552 P. 2d 688 (1976)(illegally parked); Dixon v. State, 23 Md. App. 19, 327 A. 2d 516 (1974)(driver intoxicated, illegally parked); People v. Nagel, 17 Cal. App. 3d 495, 95 Cal. Rptr. 129 (1971)(indistinguishable in all respects from instant case). As Bales, Dixon and Nagel point out, the solution is to move the car a few feet to a legal parking spot. Whether this could have been done in the instant case was not explored because of the State court's ruling.

In sum, a variety of issues were inadequately developed because of the restrictive evidentiary rulings by the State trial court. This resulted in "skeletal" fact findings by the

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[8]Vehicle and Traffic Law §1204(b)(1), which provides for impoundments, is inapplicable because it applies only to unattended vehicles and the Cruz vehicle was not unattended within the meaning of the law. Cf., Vehicle and Traffic Law §113.

state trial court. Cf., United States ex rel. Clayton v. Mancusi, 454 F. 2d 454, 457 (2d Cir. 1972), cert. denied, 406 U.S. 977 (1972). And as the indistinguishable case of Curry v. Garrison, 423 F. Supp. 110 (W.D.N.C. 1976) holds, the rulings by the trial court denied the petitioner an opportunity to fully and fairly litigate his Fourth Amendment claim.

Findings Not Adequately Supported by the Record

Citing Wilson v. Parratt, 540 F. 2d 415 (8th Cir. 1976), and United States ex rel. Terry v. Henderson, 462 F. 2d 1125 (2d Cir. 1972), the District Court essentially held that it would not examine the adequacy of the record to support the finding that an impoundment and inventory search had occurred (A-7). However, these cases hold that the sufficiency of the evidence offered to prove the defendant's guilt of the crime charged is not a matter for federal habeas review. In contrast, the issue here is whether the record supports the finding in the suppression hearing; guilt or innocence is not at issue. Under Townsend v. Sain, supra 372 U.S., at 316, the state hearing is not full and fair where the factual determinations are not fairly supported by the record. Accord, 28 U.S.C. §2254(d)(8).

"For this purpose 'fair support' should be construed as broadly as the 'clearly erroneous' standard employed in federal appellate review of trial findings on constitutional claims. Note, supra 83 Harv. L. Rev., at 1133. Thus, the test is that,

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing ~~court~~ on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Company, 333 U.S. 364, 395 (1948). In the instant case, as the District Court noted, it was argued in the State court that "the testimony concerning an impoundment was a 'cover' for an illegal search." And it is argued here that the State trial court's finding that an impoundment occurred is not fairly supported by the record.

It has already been noted that although Haacke claimed to be impounding the car, the Cruz vehicle was actually driven to the police station, not impounded. Also, Haacke made no record of the impoundment. That fact takes on added significance when one considers that the current regulation of the Hempstead Police Department on impoundments - enacted after the petitioner's arrest - requires that, "In all cases in which an inventory is conducted, the officer performing such examination shall, without unnecessary delay, make appropriate entries in his memorandum book." (A-112). And there is no authority in logic, case law or statutes for impounding the car in this case when it could have been moved a few feet and locked. In short, it appears that if his testimony is to be believed, then for unfathomable reasons, Officer Haacke silently decided to impound and search the car. He abandoned this course of action as soon as he found the marijuana and he kept it secret until the suppression hearing, nearly four months later. This testimony is simply not credible. Cf., Dixon v. State, 23 Md. App. 19, 327 A.2d 516, 517-18 (1974)("With the possible exception of the 'dropsy cases,' no aspect of Fourth Amendment litigation

has afflicted law enforcement with the yawning credibility gap wrought by inventory searches.") See also, People v. Berrios, 28 N.Y. 2d 361 (1971).

Thus, in South Dakota v. Opperman, supra, both the Court and Mr. Justice Powell repeatedly emphasized that there was "no claim that the protective procedures [were] a subterfuge for criminal investigations." 49 L.Ed. 2d, at 1006 n. 5, 1009. And the Court cited with approval the decision in United States v. Spitaleri, 391 F. Supp. 167 (N.D. Ohio 1975). 49 L.Ed.2d, at 1008. On the page cited in Opperman, the Spitaleri Court held that a valid impoundment had resulted in the discovery of a gun, stating that,

> Of critical significance to the Court in resolving the. . .issue is the routine employed by the officers in implementing an established inventory procedure to an impounded vehicle. [Officer] Gnew properly impounded the suspect automobile subsequent to defendant's arrest, contacted an AAA tow truck, proceeded to inventory the entire automobile for valuables or other personal belongings,and upon completion, executed a detailed Auto Tow Report. . . all in compliance with established police practice and prescribed tow procedure regulations. The foregoing militates against, and renders untenable, defendant's assertion that the officers intended to and did conduct a search without warrant.

391 F. Supp., at 169.

In contrast to Spitaleri, there was no evidence of an established procedure in the instant case, nor was there any written record and the alleged impoundment was not even completed. The instant case is like the post-Opperman decision of the Louisiana Supreme Court in State v. Jewell, 338 So. 2d 633 (1976). After noting the problem of police subterfuge in

this area, id., at 638, the Louisiana Supreme Court refused to believe police testimony that an inventory search had been conducted where the proper records were not made, the search was conducted at the wrong place, the vehicle's custodian was present at the time of the search, and the search extended to the ashtray. Id., at 638-39. Thus, the Court reversed, holding that the police were conducting an illegal search for incriminating evidence rather than an inventory search. Id., at 640. The same may be said of the instant case.

In sum, the finding of the State trial court that an impoundment and inventory search took place is not fairly supported by the record and a federal hearing is required. In any event, even if there is fair support for the finding, a federal hearing is still required because of the inadequate development of the material facts. United States ex rel. Jefferson v. Follette, 396 F. 2d 862, 864 (2d Cir. 1968).

CONCLUSION

FOR THE ABOVE STATED REASONS, THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON THE MERITS OF PETITIONER'S FOURTH AMENDMENT CLAIM.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EDMUND GETTENS,

Petitioner-Appellant

- against -

JOHN QUINN, Acting Chairman of the New York State Division of Parole,

Respondent-Appellee

AFFIDAVIT OF SERVICE BY MAIL

DOCKET NO. 77-208

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Melissa Keane being duly sworn deposes and says that she is a clerk in the office of James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, N.Y., Criminal Division, attorney for the above named petitioner-appellant EDMUND GETTENS herein. That she is over 18 years of age, and resides at Mineola, New York. That she served the within brief and appendix on the 5th day of April 1977 upon Louis Lefkowitz, Attorney General, 2 World Trade Center, NY

by depositing true copies of same securely enclosed in a post-paid wrapper in the Letter Box, maintained and exclusively controlled by the United States at 400 County Seat Drive, Mineola, New York.

Melissa Keane

Sworn to before me this 5th day of April

Leslie P. Rudman

LESLIE P. RUDMAN
Notary Public, State of New York
No. 30-4627216
Qualified in Nassau County
Term Expires March 30, 1978